To be argued by
SAM RESNICOFF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-812

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Petitioners,

against

ELLIOTT H. VELGER,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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Preliminary Statement

In *Lombard* v. *The Board of Education*, 502 F. 2d 631, cert. denied March 17, 1975, 420 U.S. 976, GURFEIN, J., writing unanimously for the Second Circuit, held:

> "The distinction taken by the Court in *Roth* is that where the appellant's 'good name, reputation, honor, or integrity is at stake' or 'the State, in declining to re-employ (the respondent), imposed on him a stigma or other disability that foreclosed his freedom to take

> advantage of other employment opportunities,' 408 U.S. at 573, he may claim a deprivation of 'liberty' under the due process clause of the fourteenth amendment. A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding".

At the trial in the District Court, the Assistant Corporation Counsel conversant with *Board of Regents* v. *Roth,* 408 U.S. 564; *Perry* v. *Sinderman,* 408 U.S. 593, and *Lombard* v. *The Board of Education, supra,* stated (67a):

> "Mr. Herzog: I will be very brief, your Honor.
> We agree that if there is stigma there must be some relief that the Court can give".

Associate Justice CLARK, United States Supreme Court (Ret.) sitting by designation writing unanimously for the court below held (123a-124a):

> "In light of the rationale behind both Board of Regents v. Roth, supra, and Perry v. Sinderman, supra, we must reverse the lower court's judgment. Those cases teach that when either a deprivation of a property interest, such as in a permanent job, or a deprivation of liberty, such as in a stigma that operates to foreclose other employment opportunities, result from the decision to discharge, due process requires that notice of the charges and a hearing must be granted to the dischargee. Perhaps the discharge of a police officer is stigmatization per se. But we need not announce such a 'brass collar' rule, for here the record reeks of the stigma that attached to Velger. The stigma foreclosed employment in both the public and private sectors".

The decision by Mr. Justice CLARK was a sound legal exposition by a distinguished Judge who displayed an astute

perception into the principles of law enunciated by this Honorable Court in *Roth* and *Sinderman.* The decision by the Second Circuit below was neither a departure nor a deviation from any of the decisions by this Court.

The Issues

In a disingenuous attempt to becloud the legal and constitutional issues involved, petitioners are asserting that the practical result of the Court of Appeals' decision herein is to require public employers to afford all their employees a hearing on stated charges prior to termination, and that in any event the requirement "of a hearing makes no sense at all" (pet. brief p. 11) in this case because respondent "does not deny that he committed the act for which he was fired", to wit, putting a revolver to his head.

Respondent is not seeking a pronouncement by this Court that all employees in the civil service are entitled to stated charges and a hearing thereon prior to dismissal. This lawsuit was not initiated on that basis. The lawsuit was predicated upon stigmatizing material (53a). The Court of Appeals found that the record reeked of the stigma that attached to respondent and that "the stigma foreclosed employment in both the public and private sectors" (124a).

There is absolutely no justification for the statement in in petitioners' brief (p. 11) that respondent "as much as admits that he put a gun to his head, but urges that this might have been horseplay or the like" referring to 92a, 95a. There was no such testimony. The only reference thereto was in colloquy by counsel.

In the letter of termination from the Assistant Director, Police Personnel, respondent was advised as follows (13a):

> "You are hereby notified that the Police Commissioner of the City of New York has decided not to retain you

as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner".

Respondent was not served with any charges, was not suspended from duty and was never advised in what manner and in what respect his "capacity was unsatisfactory". In his affidavit respondent stated (43a):

> "9. I was terminated by the Penn-Central Railroad Police Department because of my record of employment in the Police Department, City of New York. I do not know what is in my personnel file. I have never seen nor have I ever been advised of any derogatory matter being placed in my file. I was never given an opportunity to reply or to rebut any such statements. Under the circumstances, since I am being deprived of my right to earn a living, I respectfully submit that the action of the Police Department, City of New York, in failing and refusing to divulge to me the reasons for my dismissal and give me an opportunity to reply to any derogatory matter, is in violation of my constitutional rights to due process".

Significantly, the answer made no reference to any incident having occurred relating to a gun while respondent was in the Police Academy. Upon the trial in the District Court before Judge WERKER, petitioners did not offer any evidence relating to the gun incident and made no offer of proof with respect thereto. During the course of the oral argument in the Court of Appeals, the Assistant Corporation Counsel (representing petitioners) was asked by the Court if the Department had stated in the notice of termination (13a) that respondent was being terminated because he put his gun to his head in an apparent suicide attempt instead of stating his capacity was unsatisfactory, would respondent under those circumstances been entitled to a hearing prior to termination? The Assistant Corporation Counsel replied in the affirmative.

The Facts

Prior to January 30, 1970, the New York City Civil Service Commission advertised an open written competitive examination for the position of Patrolmen, Police Trainee, Police Department, City of New York. The Civil service announcement provided as follows (18a):

> "This examination is open only to men. A single list will be established from this examination and appointments will be made to either Patrolman or Police Trainee (Police Department) depending on age.
> Police Trainee is a trainee class of positions. A Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests, provided he has a satisfactory record as trainee and provided he passes a medical test identical to the one given to Patrolman candidates."

Respondent successfully passed the written examination and the medical and physical tests. Before he was placed on the eligible list the Civil Service Commission as required by law investigated respondent's background, school records, employment records, etc., and having found respondent eligible certified his name as qualified for appointment. The Police Department then conducted its own investigation. On January 30, 1970, respondent was appointed from the eligible list to the position of Police Trainee. On August 8, 1972, respondent became twenty-one years of age. On August 15, 1972, respondent was promoted to the position of Patrolman on probation (71a).

On February 16, 1973 with more than three years of continuous service with the Police Department, City of New York, without stated charges and without a hearing, respondent received the following written notice (13a):

> "You are hereby notified that the Police Commissioner of the City of New York has decided not to retain you

as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner".

An action was then instituted in the United States District Court for the Southern District of New York. In his demand for interrogatories, respondent requested the following information:

"Set forth all the reasons why the Police Department terminated plaintiff on February 16, 1973, inasmuch as plaintiff was continuously employed by the Police Department since January 31, 1970".

In their reply, petitioners stated:

"This interrogatory is objectionable in that plaintiff was employed as a probationary patrolman at the time of his termination and hence has no right to a statement of reasons for his termination". • • •

In response to petitioners' interrogatories, respondent set forth at length all of the government, state, and city civil service examinations which he took and passed. In his affidavit (41a-44a), respondent set forth in detail his inability to obtain employment in government and in the private sector because of his dismissal from the Police Department. In direct examination (72a-76a) respondent testified with respect to his inability to obtain employment. Appended herewith is a letter from the City of Plainfield, Police Department, State of New Jersey, rejecting respondent's candidacy for the position of Police Officer.

The Trial

At the trial in the District Court, petitioners produced a Mr. O'Brien who was employed as the administrative manager with the New York City Police Department "at present assigned to the Personnel Records Division" (98a).

On direct examination, the following testimony was elicited (99a):

"Q. What does the police department do with regard to request for information as to termination?

A. The request for information as to reason for termination is never given out.

Q. To anybody?

A. Other than policy agencies. It has to be a Governmental agency like Park Police, Government Police. If they are investigating for background, they are advised to appear at the area and we will give them such information as we consider necessary for them to make a determination.

Q. Do they have to have an authorization to obtain that information?

A. Not if it is a Government police agency.

Q. How about if it is a non-Government police agency?

A. The information is not given to them.

Q. Not given to anyone.

A. That's right."

This testimony was extremely significant in view of respondent's testimony that he took over a hundred civil service examinations and passed said examinations "many of them with high marks" (74a).

Although petitioners' witness O'Brien testified that termination records of Police candidates were not made available and were not given to non-Government police agencies his testimony was not true. The fact was that respondent's records and the derogatory matters contained therein were made available to Penn Central Railroad Station a non-Government agency.

Robert J. Steele called as a witness by respondent testified he was the Captain of Police, Commanding Officer at Pennsylvania Station, New York, Penn Central Railroad Station Police (84a) and that respondent was terminated

because of the report submitted by Lt. Lonnie Hamilton (now Captain) of his Staff who inspected and reviewed the Police Department files relating to respondent's termination. The witness further testified that respondent's "personnel evaluation reports were good" (86a).

Lonnie Hamilton employed as a night Captain with the Penn Central Railroad Police testified that respondent filled out a form which authorized the witness to obtain his records at the New York City Police Department. Mr. Hamilton further testified (87a):

> "Q. Now, first with respect to the quality of his work, working for Penn Central, was it satisfactory?
> A. So far as I know it was very good."

On the very crucial issue as to the contents of the New York City Police Department records pertaining to respondent's dismissal, Captain Hamilton testified (88a-90a):

"Q. Did he sign it?
A. Yes, sir.
Q. Then what did you do with it?
A. Two days later I went back to police headquarters and delivered it to the sergeant on duty at the office, and looked through his personnel record.
Q. You looked through the records?
A. Yes, sir.
Q. Tell us what was the reason for the dismissal from the Police Department?
A. From the New York City Police Department?
Q. Yes.
A. It occurred in the Police Academy, Velger was on probation with the New York City Police Department. It was involving approximately four or five individuals.
Q. Other patrolmen?
A. Other patrolmen. And supposedly one of the officers reported that Patrolman Velger—

Mr. Herzog: Excuse me. Is this what he said or is this what was in the records?
A. This is what was in the records, sir.

Mr. Herzog: In the records, all right.

A. That patrolman Velger had stuck a service revolver to his head in an apparent attempt to commit suicide.
Q. Did they permit you to make copies of the reports or that was not permitted?
A. I did not make copies of the reports. I took notes from the file.
Q. Then you came back and reported that to your superiors or whoever it was?
A. No, sir. I then tried to verify it.
Q. You did not try to verify it?
A. I tried to verify the information in his service file.
Q. And what happened?
A. I drew a negative attitude from the New York City Police Department. They advised me to go about it by letter. I explained to them that I had already attempted to do it by letter, and I gave up.
Q. As a police officer were you satisfied with that report?
A. No, sir.
Q. They wouldn't permit you to investigate or talk to these other policemen that were involved there, the other probationary patrolmen is that correct?
A. No, they wouldn't permit it. I just drew a blank attitude from the New York City Police Department. I decided that I could never prove or disprove exactly what happened, so I let it go as it stood.
Q. Then what happened after that, when you came back to your headquarters?
A. After that? I returned to my boss and advised him of my findings, and I told him that under the cir-

cumstances I would recommend that Patrolman Velger be terminated.

Q. And he was terminated?

A. Yes, sir."

POINT I

The decision by the Court of Appeals below was neither a departure nor a deviation from this Court's rulings in *Roth, Sinderman* and the *Lombard* decisions. *Bishop* v. *Wood,* —— U.S. ——, 96 S. Ct. 2074, accentuates the necessity for an affirmance. Since petitioners at the trial before Judge Werker in the District Court failed and refused to offer any evidence or to make an offer of proof that respondent put his gun to his head in a suicidal attempt while at the academy, a remand would be superfluous. Under the circumstances, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed and respondent reinstated to his position of patrolman, Police Department, City of New York, with back pay, damages and counsel fees.

In *Board of Regents* v. *Roth, supra,* this Court held:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '(w)here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential'. Wisconsin v. Constantineau, 400 U.S. 433, 437. Wieman v. Updegraff, 344 U.S. 183, 191; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123; United

> States v. Lovett, 328 U.S. 303, 316-317; Peters v. Hobby, 349 U.S. 331, 352 (concurring opinion). See Cafeteria Workers v. McElroy, 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's interest in his 'good name, reputation, honor or integrity' is at stake".

There can be no question but that respondent was defamed. The mere existence of the adverse, derogatory and stigmatic report which was available for inspection and review by prospective employers, government and non-government agencies operated to the immediate prejudice, damage and detriment of respondent and prevented him from earning a livelihood and securing comparable employment. What Government law enforcement agency requiring the incumbent to carry a firearm would hire or appoint respondent under the circumstances disclosed? What Government agency would hire respondent in any responsible position? The accusation that a young man twenty-three years of age had suicidal tendencies was and is a serious charge. It betokens mental aberrancy and is a stigma. Respondent should not be compelled to go through the rest of his life with the stigma of a potential suicide. Everyone had access to respondent's records except respondent. Everyone was made aware of the alleged suicide attempt by respondent except respondent.

In this connection, the Circuit Court held (122a):

> "1. *The Nature of the Charge on which Dismissal was Predicated:*
>
> It stands to reason that any charge that justifies dismissal is a most serious one. Here the exact language of the charge is not known,' but it appears to state that Velger 'while still a trainee . . . had put a revolver to his head in an apparent suicide attempt.' Such a charge suggests to most of us such severe

mental illness that it deprives one of the capacity to do any job well. It thus differs from the usual derogatory charge that is leveled at the capacity to do a specific job. Certainly, no more serious charge could be levelled at a police officer.

Moreover, the 'rookie' officer has the greater hazard because he has none of the job protection guarantees that a seasoned officer enjoys. Ordinarily, he can be severed from the force without any notice of charges or a hearing being afforded him. Police authorities must, therefore, exercise the greatest degree of care in dealing with probationary officers to make certain not only that their discharge decisions are just but also that their reasons are kept confidential. Here New York City admits that it grants ready access to its confidential personnel files to all governmental police agencies. In a case like the present one this could have the effect of closing the public sector to the probationary police dischargee and depriving him of employment in the largest and most desirable segment of his profession. The same result, in reality, is true in the private sector because New York City answers all inquiries for permission to see personnel files with the suggestion that inspection will be permitted with the consent of the dischargee. The dischargee is then placed 'between the devil and the deep blue sea'; he loses whatever his choice. Who would employ an applicant who refused to give authorization? Who would employ one who gives authorization but whose file suggests that he made an 'attempt' at suicide?

2. *The Requirements of Procedural Due Process:*

In light of the rationale behind both *Board of Regents* v. *Roth,* supra, and *Perry* v. *Sinderman,* supra, we must reverse the lower court's judgment. Those cases teach that when either a deprivation of a property interest, such as in a permanent job, or a deprivation of liberty, such as in a stigma that operates to foreclose other employment opportunities, result from the decision to discharge, due process requires that notice of the charges and a hearing must be granted to the dischargee."

In *Bishop* v. *Wood,* this Court held (96 S.Ct. 2074, 2079):

> "In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honesty, or integrity'[12] was thereby impaired. And since the latter communication was made in the course of a judicial proceeding which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim. A contrary evaluation of either explanation would penalize forthright and truthful communication between employer and employee in the former instance, and between litigants in the latter."

In the case at bar, however, there was disclosure. Every government, non-government and private agency had access to respondent's records. The tenuous defense that petitioners only permitted the inspection of its records if prior authorization had been obtained from respondent is neither persuasive nor sound (123a). In the vernacular, respondent "was damned if he did and damned if he didn't". He had no choice.

In a specious attempt to justify the illegal and obnoxious dismissal of respondent, petitioners grasping at straws have alleged difficulty in terminating an unsuitable officer who is granted tenure citing a 1947 and a 1954 case by the New York State Court of Appeals. That principle of law no longer exists in New York in view of ***Matter of Pell,***

34 N.Y. 2d 222 (1974). In any event, this demagoguery is neither relevant nor apposite. We are not concerned with any disciplinary proceeding. Similarly, petitioners' allegation that New York State Law does not require a hearing for termination of probationary employees (citing *Talamo* v. *Murphy*, 38 N.Y. 2d 637) is not only irrelevant but inaccurate. In that case, the petitioner *Talamo* a probationary Patrolman was dismissed because of a defective condition in his wrist. There was no *stigma* attached. In this connection, the New York State Court of Appeals stated:

> "It should be noted that, contrary to the inference raised in the dissent at the Appellate Division, the reason ascribed for the termination did not stigmatize petitioner or constitute a deprivation of liberty (cf. Russell v. Hodges, 470 F. 2d 212, 217 (2 Cir.))".

The state court recognized that its decision would not apply where the probationer was stigmatized.

Conclusion

The judgment of the United States Court of Appeals should be affirmed and petitioners directed to reinstate respondent to his position of Patrolman, Police Department, City of New York, with back pay, damages and counsel fees.

Dated: New York, September 24, 1976.

Respectfully submitted,

SAM RESNICOFF
and
EDWARD M. RAPPAPORT
Attorneys for Respondent.

JOSEPH FROST
Of Counsel

Letter from the City of Plainfield, New Jersey, Police Department.

(EMBLEM)

CITY OF
PLAINFIELD
NEW JERSEY

POLICE DIVISION

200 East Fourth Street
(201) 753-3039

June 6, 1974

Mr. Elliott H. Velger
1855 Kennedy Boulevard
Jersey City, N.J. 07305

Dear Mr. Velger:

You were recently notified by the New Jersey Civil Service Commission that you were certified for a position with the Plainfield Police Division. This is a formality by which Civil Service purges their list of eligible candidates of those who for various reasons have been rejected by this and other agencies.

The Plainfield Police Division has notified the Civil Service of our rejection of your candidacy for the position of Police Officer with this Division. Our commitment in this matter has not changed. We do however, thank you for your interest in the Plainfield Police Division and wish you success in your future endeavors.

Very truly yours,

THOMAS TRAUTWEIN
Thomas Trautwein
Police Officer
Administrative Bureau

TT/ao